

The claimant had last worked on June 12, 2004, and then was on vacation, which coupled with his regular days off resulted in claimant not returning to work until June 22,

2004. The claimant agreed that while on vacation he had spent two days putting siding on his house.

The claimant returned to work on June 22, 2004, and performed his regular job duties. The claimant's supervisor agreed that he did not notice claimant having any apparent shoulder problems.

Claimant alleged injury to his shoulder on Wednesday, June 23, 2004, while performing his job duty for respondent as a tire builder. Claimant works on the band side but had gone over to the tread side because the co-worker responsible for that job had taken a trainee to get more stock. While performing work on the tread side, the claimant reached to pick up tread but it was stuck and when claimant jerked on the tread he felt pain in his right shoulder.

Claimant finished work that day but the shoulder pain persisted and when he started work the following morning he told his supervisor about the incident the day before and that he had shoulder pain. The supervisor took claimant to the plant dispensary later that morning. Dr. Myron J. Zeller examined claimant, diagnosed right shoulder strain with a possible rotator cuff tear. Claimant was placed on modified duty with no use of the right arm.

The claimant's supervisor, Matt Boarman, testified that claimant had said that he had taken five aspirins each day while on vacation because of arm pain. It was also mistakenly reported that claimant's injury occurred on the same day he had returned to work after his vacation. Lastly, the supervisor noted that claimant's work on the day of the alleged injury did not require handling tread because he was providing training. Based upon this information the respondent notified claimant that his workers compensation claim was denied.

When cross-examined, the supervisor agreed claimant had worked a day before the injury so the accident did not occur on the same day claimant had returned from vacation. As previously noted, claimant explained how the accident occurred and why he was working on the tread side instead of his usual side. And claimant explained that the trainee was with another employee at that time. Lastly, the claimant denied that he told the supervisor he was taking aspirins. Claimant explained he cannot take aspirins because he is a hemophiliac.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.¹

¹ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

The Board finds where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representative testify in person. In awarding claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed his testimony. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

Moreover, the claimant denied he had hurt his shoulder while on vacation. And after his vacation claimant had returned to work for a day and performed his job duties without shoulder problems. Claimant explained his activities on the day of the accident and the supervisor agreed that although the worker on the band side does not ordinarily go around to the tread side, he could not say it never happens. Finally, although the supervisor was adamant claimant said that while on vacation he was taking five aspirins for arm pain, nonetheless, the supervisor agreed claimant did not mention shoulder pain.

The Board finds claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment on June 23, 2004, and affirms the ALJ's Order for Compensation.

WHEREFORE, it is the finding of the Board that the Order for Compensation of Administrative Law Judge Brad E. Avery dated September 30, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

BOARD MEMBER

c: Mitchell D. Wulfekoetter, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director